Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147

REPLY COMMENTS OF NATIONAL ALEC ASSOCIATION/ PREPAID COMMUNICATIONS ASSOCIATION

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EXECUTIVE SUMMARY

The Commission should decline to take any action that casts doubt on the future of the Unbundled Network Element Platform ("UNE-P"), particularly in light of the Supreme Court's recent affirmation of the Commission's authority to require incumbents to combine UNEs. The dismantling of UNE-P will eliminate an important entry strategy and threaten the continued growth of a vibrant market segment served by competitive carriers focused on consumers that tend to be ignored or underserved by the ILECs.

There is no third-party supplier to which providers of voice-grade residential service can turn to purchase loop, switching and transport outside the incumbent's network. Thus, for the purposes of an impairment analysis, the only alternative to the incumbent is self-provisioning. The comments, however, vividly demonstrate why self-provisioning is not a viable alternative for these providers. The record establishes that those CLECs providing voice grade services to residential consumers would be "impaired" as that term is used in Section 251(d)(2) if access to UNE-P is denied. State commissions and the National Association of Regulatory Utility Commissioners ("NARUC") concur. Indeed, on November 14, 2001 NARUC adopted the Resolution that "State commissions should support the implementation of universal availability of the UNE-P."

The provision of service by NALA/PCA members truly expands universal service because these providers generally are connecting customers to the public network who otherwise would go without service. Commission action that denies NALA/PCA members the option of purchasing UNE-P consigns them to either resale, with its higher costs and fewer options, or market exit. Because either alternative is detrimental to these consumers, such action is inconsistent with the national interest in promoting universal service.

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The National ALEC Association/Prepaid Communications Association ("NALA/PCA") hereby submits these Reply Comments in response to the *Notice of Proposed Rulemaking* in the above-referenced proceeding and the initial comments received in response thereto.[1]

I. INTRODUCTION

NALA/PCA is a trade association comprised of companies that since 1996 have been providing local telephone service to hundreds of thousands of residential consumers nationwide.[2] NALA/PCA members' core customers are those that historically have been considered high-risk – due, for example, to a poor credit history or lack of sufficient identification – and thus unable

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[1] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, CC Docket No. 01-338, Notice of Proposed Rulemaking, FCC 01-361 (rel. Dec. 20, 2001) ("*NPRM*"). On May 30, 2002, the Commission released a Public Notice extending the Reply Comment Deadline to July 17, 2002 to allow interested parties an adequate opportunity to discuss the impact of *United States Telecom Ass'n v. FCC*, 290 F.3d. 415 (D.C. Cir. 2002) ("*USTA v. FCC*").

[2] In addition to service providers, NALA/PCA members include a wide range of companies that support the prepaid local services industry.

to obtain local telephone service from ILECs. NALA/PCA members typically offer these consumers a fixed-rate local service option that restricts the customer's access to long-distance and other usage-based services (although in some jurisdictions blocking is either not available for all services or is cost-prohibitive). These customers fall squarely within the "mass market" that the Commission is considering.

NALA/PCA members generally have entered the market as resellers, an entry strategy endorsed by the Commission in its *Local Competition Order*. *See, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, ¶ 907 (1996). Much as Congress anticipated, these NALA/PCA members either have moved or are moving away from the resale model and towards a facilities-based model. The purchase of unbundled network element platform ("UNE-Platform" or "UNE-P") from an incumbent local exchange carrier ("ILEC") is serving as these carriers' natural first step from resale.

By considering whether to contract the national minimum list of unbundled network elements – particularly unbundled local switching ("ULS") – this proceeding casts doubt on the future of UNE-P. The dismantling of UNE-P will eliminate an important entry strategy and threaten the continued growth of a vibrant market segment served by competitive carriers focused on consumers that tend to be ignored or underserved by the ILECs. The Commission should decline to take action that leads to this anti-competitive, anti-consumer result. As the UNE Platform Coalition recommends, the Commission should hold true to the vision articulated in the Telecommunications Act of 1996 (the "1996 Act") and allow market forces to guide the deployment of investment and the sequence of competitive expansion. It is critical to the realization of the policies and goals embodied in the 1996 Act that the Commission retain "all

the basic tools required by entrants – most especially those tools beginning to demonstrate success – and allow the market, which is to say consumers, to decide which strategies and innovations provide lasting benefit." Comments of the UNE Platform Coalition at 4-5.

II. THE *VERIZON* DECISION AFFIRMS AN ILEC'S DUTY TO OFFER UNE-P

Under Section 251(d)(2), when determining what network elements should be made available, the Commission must consider, "at a minimum," whether CLECs would be impaired from offering the services they seek to offer without access to specific network elements. The statutory provision, however, provides no detail as to either the kind or degree of impairment that would qualify.

The Supreme Court remanded the Commission's first attempt to construe this statutory section because the Commission had made two interpretive errors regarding the proper standard for non-proprietary network elements. *See, AT&T Corp. v. Iowa Utilities Board,* 252 U.S. 366 (1999). Following remand, the Commission adopted a new unbundling standard designed to implement Section 251(d)(2) in light of the Supreme Court's opinion. *See, UNE Remand Order Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*"). Under the revised approach, a CLEC would be deemed "impaired" in its ability to provide the services it seeks to offer if, "taking into consideration the availability of alternative elements outside the incumbent's network, including self-provisioning . . . or acquiring an alternative from a third-party supplier, lack of access to that element materially diminishes a requesting carrier's ability to provide the services it seeks to offer." *UNE Remand Order, supra,* at 3725. The Commission found five factors particularly relevant to determining whether a carrier's ability to provide service is "materially diminished" by the lack of access to a network element: timeliness, quality, ubiquity, and operational issues associated

with the use of an alternative. The *Notice of Proposed Rulemaking* is the first triennial review of the Commission's policies on UNEs, including the impairment standard it adopted in the *UNE Remand Order*.

On May 13, 2002, the Supreme Court affirmed the Commission's authority on two key issues: (1) to require states to use the total element long run incremental cost ("TELRIC") pricing standard; and (2) to require incumbents to combine UNEs at a CLEC's request when the elements are leased to the CLEC. *See Verizon Communications, Inc. et al. v FCC*, 122 S.Ct. 1646 (2002). The Court summarized its reasoning in a concluding paragraph:

> The 1996 Act sought to bring competition to local-exchange markets, in part by requiring incumbent local-exchange carriers to lease elements of their networks at rates that would attract new entrants when it would be more efficient to lease than to build or resell. Whether the FCC picked the best way to set these rates is the stuff of debate for economists and regulators versed in the technology of telecommunications and microeconomic pricing theory. *The job of judges is to ask whether the Commission made choices reasonably within the pale of statutory possibility in deciding what and how items must be leased and the way to set rates for leasing them.* The FCC's pricing and additional combination rules survive that scrutiny.

Verizon, supra, at 1687 (emphasis added).

Eleven days later, on May 24, 2002, a panel of the D.C. Circuit issued its opinion in *USTA v. FCC*, remanding the Commission's *UNE Remand Order.* Despite the Supreme Court's reminder that "the job of judges is to ask whether the Commission made choices reasonably within the pale of statutory possibility," 122 S. Ct. at 1687, the D.C. panel adopted a far more expansive view of its role. It rejected the Commission's decision to adopt a "uniform national rule" on the grounds that the decision has the effect of making UNEs "available to CLECs in many markets where there is no reasonable basis for thinking that competition is suffering from any impairment of the sort that might have [been] the object of Congress' concern." The

opinion instructs the Commission to implement a "more nuanced concept of impairment," one that reflects specific markets or market categories. Further, to the extent a Commission finding of cognizable competitive "impairment" rests on a disparity in cost between CLEC and ILEC, the cost differential should be "based on characteristics that would make genuinely competitive provision of an element's function wasteful" – not the cost disparities that are universal as between new entrants and incumbents in any industry.

On July 8, 2002, the Commission filed its Petition for review and rehearing of the appellate panel's decision. The Petition convincingly argues that the panel overstepped the bounds of proper judicial review and issued a decision that is fundamentally in tension with recent and pertinent Supreme Court authority, including the *Verizon* decision, dealing with closely-related substantive requirements of the 1996 Act. The Petition argues, moreover, that the decision requires rehearing because it can be read to establish an unwarranted restriction on the Commission's implementation of the Act's network element provisions that is, at a minimum, in tension with other provisions of the 1996 Act.

Whatever the outcome of the appellate proceedings, the Commission already has before it a sufficient basis to satisfy the *USTA* criteria with respect to the residential markets in which NALA/PCA members operate. Residential consumers constitute a readily-identifiable market. Further, the cost disparities between ILEC and CLEC in this market go far beyond the disparities attributable to mere market entry. While economies of scale and scope may be present when service is provided to an entire apartment complex or multiple dwelling unit, such economies are not present when service is provided in response to individual consumer demand. In this case, the absence of UNEs and UNE-P either discourages the CLEC from entering the market in that area or requires the CLEC to construct unnecessarily duplicative facilities. Faced with a

virtually identical question, the *Verizon* Court affirmed Commission action that favors competition and allows CLECs to access unbundled elements:

> Is it better to risk keeping potential entrants out, or to induce them to compete in less capital-intensive facilities with lessened incentives to build their own bottleneck facilities? It was not obviously unreasonable for the FCC to prefer the latter.

Verizon, supra, at 1672.

III. THE RECORD ESTABLISHES THAT CLECS OFFERING RESIDENTIAL SERVICES REQUIRE ACCESS TO UNE-PLATFORM

NALA/PCA agrees generally with those comments filed herein explaining why CLECs will be impaired in their ability to offer services if denied access to UNE-P. *See, generally,* Comments of Association for Local Telecommunications Services ("ALTS"), Fiber/Switch-Based CLEC Coalition, UNE Platform Coalition, and Z-Tel Communications ("Z-Tel").

Those comments address the factors relevant to an impairment analysis and demonstrate why UNE-P remains essential to the provision of local service, particularly the provision of voice-grade services to geographically-dispersed residential consumers. For entrants and carriers that do not have their own facilities, UNE-P offers substantial cost benefits when compared to resold services, which are subject to unreasonably low discounts. Unlike resale, which limits the CLEC to offering only those services the ILEC provides at retail, UNE-P accommodates and encourages carrier innovation.[3] UNE-P virtually guarantees ubiquity of coverage. There are significant operational benefits, as well, which are discussed at length in the record. *See, for example,* Comments of Z-Tel Communications ("Z-Tel"), Comments of UNE Platform Coalition.

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[3] "[S]ection 251(c)(4) does not impose on incumbent LECs the obligation to disaggregate a retail service into more discrete retail services. The 1996 Act merely requires that any retail services offered to customers be made available for resale." *Local Competition Order, supra,* at ¶ 877.

There is no third-party supplier to which providers of voice-grade residential service can turn to purchase loop, switching and transport outside the incumbent's network. Thus, for the purposes of an impairment analysis, the only alternative to the incumbent is self-provisioning. Z-Tel's comments, however, vividly demonstrate why self-provisioning is not a viable alternative for providers of voice-grade residential service. Z-Tel explains in detail how the costs to self-provision switching vastly exceed the cost of the switch itself, making profitability elusive. *See* Comments of Z-Tel at 34-38 ("According to Z-Tel's business model, *even if a switch in New York City were free,* it would never be profitable to deploy a switch and serve mass market consumers" if CLECs had to pay, up-front, the $185.00 rate that Verizon and the New York Public Service Commission agree is the TELRIC-compliant cost of a hot cut.) (emphasis in original).[4] Z-Tel concludes that if self-provisioned switching cannot be used economically to serve the mass market in densely-populated New York City, it would be unreasonable for the Commission to presume that it could be utilized economically anywhere." *Id* at 37.[5]

The National Association of Regulatory Utility Commissions ("NARUC") has recognized that competitors seeking to serve the residential and small-business market have no third-party option and must rely on UNE-P. On November 14, 2001 NARUC adopted the Resolution that "State commissions should support the implementation of universal availability of the UNE-P, on the basis that one form of entry should not be favored over another." *See*

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[4] As a result of a settlement the effective cost to CLECs for the next two years is $35.00. Verizon had previously charged CLECs $24.00. *Id.* at 35.

[5] Like NALA/PCA members, Z-Tel focuses on mass market consumers of voice products. *Id.* at 4.

Comments of NARUC at 9 and Resolution attached thereto.[6] NARUC's comments affirm its support for UNE-P. *Id.* at 9. In addition, numerous state commissions filed comments supporting the continued availability of UNE-P. *See, for example,* Comments of New York Public Service Commission (opposing the elimination of any of the UNEs that comprise the UNE platform because CLECs would be impaired in their ability to compete without the availability of UNE-P).

There is no doubt that CLECs – particularly those providing voice grade services to residential consumers – would be "impaired" as that term is used in Section 251(d)(2) if access to the UNE platform is denied. State commissions and NARUC concur. The Commission should continue to require that incumbents continue to provide UNE-P as well as existing UNEs including unbundled loops, transport, and switching.

IV. UNE-P PROMOTES UNIVERSAL SERVICE IN AN HISTORICALLY-NEGLECTED MARKET SEGMENT

NARUC's November 2001 Resolution recognizes that the "vast majority" of access lines in the United States – approximately 144 million out of 174 million total switched lines – are provided to mass market residential and small business consumers of analog dial tone service. The Resolution also recognizes that many state commissions have embraced UNE-P as a means to expand customer choice for these mass market customers. Nonetheless, the incumbents contend that unbundling requirements must be reduced or eliminated so as to spur investment in, and deployment of, broadband services.

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[6] NARUC also opposes Commission attempts to constrain State authority to determine if UNE-P should be made available in particular markets and strongly supports state commission authority to impose unbundling requirements that *exceed* those imposed by the Commission. *Id.* at 7, 9.

The ILEC's argument is speculative and premised on a skewed construction of the 1996 Act. Under this interpretation, the most important obligation under the 1996 Act is the regulator's Section 706 duty to "encourage" the deployment of advanced telecommunications capability on a "reasonable and timely basis;" their own duties under the Act are minimized or disregarded, particularly the duties to provide requesting carriers with nondiscriminatory access to unbundled network elements, including local switching, and to do so "in a manner that allows requesting carriers to combine such elements in order to provide" telecommunications service. *See* 47 U.S.C. §§ 251(c)(3), 271(c)(2)(B)(vi).

Numerous commenters recognize that the ILEC position has anti-competitive ramifications. *See*, for example, Comments of California Public Utility Commission at 1 ("While California appreciates the need to encourage the ILEC to continue to invest in its network, such investment must not come at the expense of reduced competition, and thus fewer options from which consumers may choose among carriers and services."). The ILEC position also has negative implications for universal service.

The consumers that NALA/PCA members typically serve are caught in a "phone divide:" too rich to qualify for Lifeline service but, given their credit problems, too poor for traditional local service. NALA/PCA members help bridge this phone divide by serving as "alternative universal service providers" to this segment of the market.[7] They ensure that even credit-impaired consumers are able to obtain local dial-tone, including access to emergency 911 services. The provision of service by NALA/PCA members truly expands universal service because these providers generally are not competing with the ILECs and most CLECs for the

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[7] Under current rules, NALA/PCA members cannot be designated as eligible telecommunications carriers ("ETCs") that qualify for universal service reimbursement if they block 1+ and 0+ dialing capabilities and/or operate as resellers. *See* 47 C.F.R. §§ 54.101(b), 54.201(d)(1).

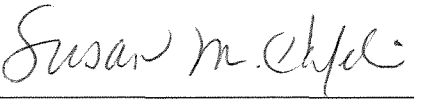
same customer base; rather, they are connecting customers to the public network who otherwise would go without service. Denying NALA/PCA members the option of purchasing UNE-P consigns them to either resale, with its higher costs and fewer options, or market exit.[8] Because either alternative is detrimental to those consumers who occupy this market segment, such action cannot be consistent with the national interest in promoting universal service. *See* 47 U.S.C. § 254.

CONCLUSION

Based on the foregoing, NALA/PCA urges the Commission to continue to require that incumbents provide their competitors with access to unbundled elements and, upon competitor request, to combine those elements and offer an unbundled network element platform.

Respectfully submitted,

NATIONAL ALEC ASSOCIATION/ PREPAID COMMUNICATIONS ASSOCIATION



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[8] The higher costs of resale for prepaid providers include the costs associated with blocking unwanted services that must be purchased from the incumbent. UNE-P providers, on the other hand, are able to purchase only those services that they specifically request.